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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 786.

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

vs.

ERWIN M. FRIED.

BRIEF OF PETITIONER.

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vs.

ERWIN M. FRIED.

BRIEF OF PETITIONER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Counsel on behalf of the Petitioner respectfully submit the following:

Opinions Below.

The decision of the Circuit Court of Appeals is reported in 67 F. (2d) 352.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938). The judgment of the Circuit Court of Appeals was entered September 19, 1933. Petition for rehearing was filed on October 17, 1933 (R. 25) and denied on November 15, 1933 (R. 26). Petition for Certiorari was filed on February 13, 1924, and Certiorari was granted on March 19, 1934.

Questions Presented

A. Whether the requirement of a negotiable instrument for a sum certain is met in a note which provides for interest on principal at the rate of *"7 per cent per annum from date until fully paid. Interest payable semi-annually."*, and also that *"Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually"*?

The Circuit Court of Appeals decided that:

"Under the law merchant, provisions for the payment of a principal sum with interest together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due."

B. Whether a federal court is bound by the Judiciary Act to follow a decision by the highest court of a State which interprets the Negotiable Instruments Act of that State?

The Circuit Court of Appeals decided that:

"The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

C. Whether a federal court fails to give full faith and credit to the Negotiable Instruments Act and a decision of the highest court of a State interpreting it when, in adjudicating rights created in that State, the federal court refuses to follow that decision because the statute is declaratory?

The Circuit Court of Appeals decided that:

"The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

Statement of the Case

The Burns Mortgage Company, Inc., as holder, brought an action in assumpsit in the United States District Court for the Eastern District of Pennsylvania, against Erwin M. Fried, the maker, upon a series of six promissory notes for $1,000.00 each, payable six months, one year, eighteen months, two years, thirty months and three years after date, respectively (R. 2). The notes were executed, delivered and payable in Florida (R. 2). Each note provided for an interest rate on the principal sum "of 7 per cent per annum from date until fully paid. Interest payable semi-annually," and also provided that "Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually" (R. 4, 5, 6, 7).

The payee of the notes was the Golden Isles Corporation, which, prior to maturity, endorsed them in blank and delivered them for value to Walter Williamson (R. 3). The notes were not paid when due, and Walter Williamson subsequently transferred them by delivery to the plaintiff, Burns Mortgage Company, Inc. (R. 3).

The defendant, in the lower Court, filed an affidavit of defense raising questions of law, in the nature of a statutory demurrer, on the ground that the notes were not negotiable instruments in that they did not provide for a "sum certain" (R. 7).

The District Court, in an opinion by Dickinson, D. J., (R. 10), determined that one who acquires a negotiable instrument after maturity can sue on it in his own name (R. 12). The Court held, however, that the notes in suit were not negotiable because they provided for the payment of interest prior to the maturity of the principal, and because they provided for interest at a higher rate on deferred interest payments (R. 12, 13).

The District Court, in an opinion by Dickinson, D. J., (R. 13), on Motion for Re-argument, ignored without comment the contention of the plaintiff that, in determining the negotiability of the notes, the Court must follow the law of Florida as decided by the Supreme Court of Florida, and denied the motion on the ground that there can be no certainty of sum if a note provides for interest payments prior to the maturity of principal (R. 15).

Judgment of *non pros.* was entered against the plaintiff by the District Court after the plaintiff declined to amend his suit in order to sue in the name of the payee as an assignee of an ordinary chose in action and subject to defenses available against the payee (R. 16).

The Circuit Court of Appeals, in an opinion by Thompson, C. J., affirming the judgment (R. 21), held that even though the notes were executed in Florida, the Federal Court was not bound by a decision of the Supreme Court of Florida that such notes were negotiable under the Florida Negotiable Instruments Act (R. 23). The Court ruled that cases involving the negotiability of bonds having interest due prior to the maturity of principal were not in point because interest coupons were attached (R. 24). It also held that "Under the law merchant, provisions for the payment of a principal sum with interest, together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due" (R. 24), and render the notes non-negotiable.

The Circuit Court of Appeals denied a Petition for Rehearing (R. 26).

Assignment of Errors.

1. The Circuit Court of Appeals erred in affirming the judgment of the Court below.

2. The Circuit Court of Appeals erred in denying the Petition for Rehearing.

3. The Circuit Court of Appeals erred in holding that in determining the question of negotiability of a promissory note executed, delivered and payable in Florida, the federal court was not bound by the construction of the Florida Negotiable Instruments Act by the Supreme Court of Florida.

4. The Circuit Court of Appeals erred in holding that the notes in suit were not negotiable.

Summary of Argument.

A. The basic issue of this case is whether certain instruments, executed, delivered and payable in Florida, were non-negotiable because of their interest provisions. It will be shown that the notes are negotiable because:

(1) commercially the instruments are recognized as negotiable;

(2) legal authorities recognize them as negotiable; and

(3) on principle they should be recognized as negotiable.

The holding of the lower Court should, therefore, be reversed on the ground that the instruments are negotiable.

B. The lower Court also held that a decision of the highest Court of the State of Florida which interpreted the Florida Negotiable Instrument Act was not binding upon the federal court because that Act was declaratory of the common law. It will be shown that the lower Court was bound by the decision of the highest Court of Florida in interpreting the Florida statute because:

(1) Section 34 of the Judiciary Act compels a Federal Court to be bound by "the laws of the several states • • • in cases where they apply"; and

(2) Article IV of the Federal Constitution compels a federal court to give "Full Faith and Credit" to the "public Acts • • • and judicial Proceedings" of the State of Florida.

The holding of the lower Court, therefore, should be reversed also on the ground that a federal court is bound by the decision of the highest court of Florida in interpreting the Florida Negotiable Instruments Act.

ARGUMENT.

A.

PROVISIONS FOR INTEREST ON PRINCIPAL AT 7% FROM DATE, PAYABLE SEMI-ANNUALLY, AND FOR INTEREST ON DEFERRED INTEREST PAYMENTS AT 10% FROM MATURITY, PAYABLE SEMI-ANNUALLY, DO NOT PREVENT INSTRUMENTS FROM BEING NEGOTIABLE.

1. Commercially the instruments are recognized as negotiable.

This Court, apparently for the first time, is confronted with the fundamental problem of the negotiability of instruments as affected by their interest provisions. Were this the day of Lord Mansfield, the following quotation from Chitty on Bills and Notes, *194, shows how the negotiability of bills and notes would probably be determined:

> "The courts have always, in mercantile affairs, endeavored to adapt the rules of law to the course and method of trade and commerce, in order to promote it; and when new cases have arisen on the mercantile law, they consult traders and merchants as to their usage in regard to bills."

Such a solution today is, of course, out of the question. However, its underlying principle should not be ignored. Thus it has been stated very appropriately in reference to the effect of attorneys' fees on negotiability:

> "The whole question is, do they render the instruments so uncertain as to destroy their fitness to pass current in the business world? The business world itself ought to be permitted to answer that question."
>
> **Cudahy Packing Co. vs. State Nat. Bank, 134 Fed. 538, 545 (C. C. A. 8th, 1904.)**

Under the early common law, an investigation of business practices concerning bills and notes would not be undertaken by the court. Such practices, however, soon became recognized as part of the law merchant and as such they became material as relating to a custom, which could be proved as a fact. It was not long, however, before the law merchant came to be recognized as "law" and the common law courts began to give effect to commercial practices just as if they were part of the common law. Thus from this point on courts of their own accord took judicial notice of current business practices in regard to bills and notes. An excellent discussion of this historical development is found in Note A to the case of

Mandeville and Jameson vs. Riddle & Co., 5 U. S. 290 (1803).

This brings the issue to the determination of whether the "business world" would deem the instruments in suit negotiable. The controversy centers about the interest provisions only. These provisions have a two-fold effect. They provide for: (1) the periodical payment of interest before the maturity of principal; and (2) the payment of a higher rate of interest on such interest as is not paid when due.

The notes, it will be noted, are long term obligations under seal. Such notes are in common usage throughout the country, and are generally used in two types of transactions. Corporate debentures are commonly in this form. Sometimes these have coupons attached, the so-called coupon bond, and at other times coupons are not attached. The other type of security, in the form of the notes in the case at bar, is represented by obligations secured by mortgage. Sometimes the fact that they are so secured is indicated on their face, whereas at other times there is no such indica-

tion. Notes of this type are used as a substitute for the familiar bond and warrant which accompanies the real estate mortgage.

In view of the use of notes as ordinary corporate debentures and as evidences of indebtedness secured by mortgage, their interest provisions are very important features. This importance, of course, lies in the fact that the investor is interested in a regular income. To effectuate that purpose, these notes first provide for the semi-annual payment of interest, and then, to aid in the accomplishment of that purpose, they provide for interest upon interest if it is unpaid.

The commercial advantages of notes with such interest provisions led to their early adoption in business. Thus in the early case of

Riker vs. Sprague Mfg. Co., 14 R. I. 402, 403 (1884)

there is a printed note providing for interest before maturity and interest on interest as follows:

"Three years from Jan. 1st, 1874, for value received, * * * promise to pay to the order of * * * One Thousand Dollars, with interest from Jan. 1st, 1874, *payable semiannually,* at the rate of seven and three tenths *per cent. per annum,* till said principal sum is paid, whether at or after maturity; *and all instalments of interest in arrear shall bear interest* at the rate aforesaid till paid, but reserving the right to pay this note before maturity in instalments of not less than (5) *per cent.* of the principal thereof, at any time the semi-annual interest becomes payable." (Italics supplied.)

SECURED BY MORTGAGE

In

2 Paton's Digest on Legal Opinions and Banking Laws (1926), p. 2052,

there are shown forms of notes used in Arizona and California which provide for interest payable periodically and

with further provisions that, if not paid when due, interest is to bear interest.

In one of the form books most often referred to,

Cutler's Tiffany's Form Book (2nd ed. 1927) p. 1617,

there are forms of mortgage notes with interest payable in installments. These forms are shown with and without interest coupons attached.

In many States, there have been adjudications by the Courts which reveal notes with provisions similar to those in the notes at bar. It is obvious that, if there have been many decisions involving such notes, they must be in wide use and circulation. Throughout this brief, counsel for petitioner will cite cases with such provisions that arose in the following jurisdictions: District of Columbia, Florida, Iowa, Massachusetts, Montana, New Jersey, New York, Pennsylvania, South Dakota, and Washington. This widespread use of such provisions in notes can only mean that the business world has recognized their expediency.

Assuming the validity of the sole contention against the negotiability of such instruments, *i. e.*, that they are not for a mathematical sum certain, the language of Mr. Justice Grier in

Mercer County vs. Hacket, 68 U. S. 83 (1863)

is very apropos:

> "A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malliability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common

law * * * That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court, but of nearly every State in the Union, is well known and admitted."

It is with this thought in mind that Prof. Chafee in his article on

Acceleration Provisions in Time Paper (1919) 32 Harv. L. Rev. 747, 751,

has stated:

"It must not be forgotten, however, that these rules of certainty are not mathematical formulae evolved out of the pure reason of the judges, but are business requirements created by business needs and susceptible of modifications with changing commercial conditions. Law is made for business, not business for law. While the influence of custom on legal principles has sometimes been exaggerated, *the history of negotiable instruments leaves no doubt that the courts have based the governing principles upon actual commercial practice,* though modifying it when it seemed unreasonable or out of accord with general considerations of justice." (Italics supplied.)

Since current business practice, as shown above, has sanctioned the instruments in suit, this Court should likewise sanction their use and hold that they are not rendered non-negotiable merely because they provide for interest payable semi-annually and interest on interest at a higher rate if it is not paid when due.

2. Legal Authorities recognize the instruments as being negotiable.

The commercial advantages of the notes, as indicated above, were due to the provisions for interest payable in installments and for interest on unpaid interest. To determine how the legal authorities have treated these provisions it is convenient to treat them separately.

(a) Interest payable in installments before maturity.

Examination of the authorities has not disclosed one single case which has held that an instrument is non-negotiable because it provided for interest payable in installments before maturity. This same conclusion is seen in

Commercial Nat. Bank vs. Consumers Brewing Co., 16 App. D. C. 186, 199 (1900),

where the Court said:

> "Agreement is apparently universal, also, that stipulations for the payment of interest at stated periods, before the maturity of the principal do not impair negotiability; and whether those periods recur monthly, as in this instrument, or less frequently as is usual, can of course, make no difference."

A similar holding under the Negotiable Instruments Act is seen in

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911),

where the negotiability of a note with interest installments prior to maturity of principal was upheld in the following language:

> "It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing signed by the maker, and contain an unconditional promise to pay a sum certain in money. The fact that the interest was payable in installments

> does not render the notes uncertain, for the statute expressly provides that payments may be made by installments. This applies as well to interest as to principal. The argument made by counsel, that an installment may not be paid when due, and therefore the instrument would not show upon its face what amount would be due at maturity, would apply equally to the principal, where payable by installments."

Under the law of Florida, it is well settled that a provision in a note, calling for the payment of interest in installments before the maturity of the principal sum of the note, does not destroy the certainty of amount or its negotiability. The leading Florida case on the point is

Taylor vs. American National Bank, 63 Fla. 631, 57 So. 678 (1912).

In that case, suit was brought upon a promissory note for $2250.00 due and payable two years after date, *with interest* from date at the rate of eight per cent per annum, *payable quarter-annually*. The note was accompanied by an ordinary real estate mortgage, which contained a provision to the effect that, upon default in the payment of any installment of interest, which interest was payable quarter-annually, the whole principal amount of the said note thereupon became due and payable. The defense was that the note was not negotiable because of uncertainty. The Florida Supreme Court held that the note was negotiable notwithstanding the provision calling for interest payments prior to the maturity of the principal of the note. The Court in its opinion, after citing Section 2 of the Negotiable Instruments Law, said:

> "It will be observed that the note for $2,250.00, purchased by the appellee, as alleged in the bill of complaint *is for a sum certain*, and would be, under the provisions of such section, even if it contained a provision to the effect that, upon default in payment of any installment of interest, *which interest is payable*

quarter annually, the whole amount of such note should thereby become due and payable. The note contains no such provision, but the accompanying mortgage, given to secure the payment of the indebtedness and which was assigned to the appellee at the same time that the note was endorsed to it does contain such provision. *It cannot be successfully contended, then, that such note was not negotiable* * * *"

"Having found that the note in question was negotiable, we must now determine whether or not, at the time it was purchased and taken by the appellee, it was overdue * * *" (Italics supplied.)

Probably the most significant fact showing the negotiability of instruments with similar interest provisions is the host of cases with such provisions where court and counsel did not even question the negotiability of such instruments. Indeed, one of the most important conflicts of the law of bills and notes is based on the negotiability of such instruments. This conflict involves the question of whether one is a *holder in due course* who acquires the instrument prior to maturity of principal but after a default in payment of an interest installment. This obviously presupposes negotiability. The leading case on this issue is

National Bank vs. Kirby, 108 Mass. 497 (1871),

which involved a note payable at the end of four years, with interest payable annually, and the Court held that a default in the payment of an interest installment was not sufficient to prevent the holder from being a holder in due course. The following quotation from that case shows the basic reason for the decision (at p. 502):

"There is a large class of negotiable securities, the principal of which is payable only at the end of many years, but with interest payable either annually or semi-annually; and many of the notes given in the purchase of real estate and secured by mortgage, espe-

cially in this country, are of this class, as are most of the obligations for debts contracted by public and many of those incurred by private corporations, and it is important that the value due to their negotiable character should not be impaired by new rules, tending to lessen their currency and credit. *Henry v. Flagg*, 13 Met. 64. *Ferry v. Ferry*, 2 Cush. 92. *Sparhawk v. Wills*, 6 Gray 163. *The City v. Lamson*, 9 Wallace 477."

Among the authorities which have taken up the issue of holder in due course are two decisions of this Court, both of which cited and approved the *Kirby case, supra:*

Cromwell vs. County of Sac, 96 U. S. 51 (1877);
Railway Co. vs. Sprague, 103 U. S. 756 (1880).

Thus in the *Cromwell case*, this Court, after upholding the *Kirby case*, said:

"To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually."

In the *Sprague case*, there is the following language by this Court:

"This point has been expressly ruled by this Court in *Cromwell vs. County of Sac*, 96 U. S. 51. In that case, the court, speaking by Mr. Justice Field said: '*The non-payment of an instalment of interest when due could not affect the negotiability of the bonds* or of the subsequent coupons. Until their maturity a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities.' To the same effect see *National Bank of North America vs. Kirby*, 108 Mass. 497, and Boss vs. Hewitt, 15 Wis. 260." (Italics supplied.)

In the case of

Vermilye & Co. vs. Adams Express Co., 88 U. S. 138 (1874),

there were involved instruments due in three years with interest payable semi-annually. This Court held:

> "*They had the ordinary form of negotiable instruments,* payable at a definite time, and that time had passed and they were unpaid. * * * These were simply notes, *negotiable it is true,* having when issued three years to run, which three years had long expired, and the notes were due and unpaid." (Italics supplied.)

Likewise in

Morgan vs. United States, 113 U. S. 476 (1884),

long term bonds with interest payable semi-annually were held to be meant to pass as money, in the following language:

> "These beneficial results were greatly facilitated, if not made feasible, by the *unquestioned negotiability* of the called bond, which, when subjected to the right of redemption reserved by their terms were therefore considered and treated as equivalent to money." (Italics supplied.)

Although the above-mentioned cases, which were in this Court, involved instruments with interest coupons attached, this played no part in the decision other than to show the existence of knowledge of the default in interest.

A complete review of all the authorities on the holder in due course issue is contained in

Barbour vs. Finke, 47 S. D. 644, 201 N. W. 711 (1924).

Among the cases there cited are the decisions of this Court just referred to and 31 other cases representing 16 states, all of which sustain the conclusion reached in the *Bank vs. Kirby case.*

In addition to this last mentioned line of cases the following are but a few of many cases in which the instru-

ments provided for periodical interest before maturity and yet they were treated as negotiable instruments without any question:

Utah State Nat. Bk. vs. Smith, 180 Cal. 1,179 Pac. 160 (1919);

Lister vs. Donlan, 85 Mont. 571, 281 Pac. 348 (1929);

Wheaton vs. Pike, 9 R. I. 132 (1868);

Continental Etc. Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Wagner vs. Benjamin, 120 Wash. 532, 207 Pac. 1045 (1922).

On the basis of the authorities, therefore, it must be concluded that the provision for the periodical payment of interest before maturity does not affect negotiability.

(b) Interest on interest at a higher rate.

The following decisions expressly hold that interest on interest does not prevent instruments from being negotiable:

Lister vs. Donlan, 85 Mont. 571, 281 Pac. 348 (1929);

Continental Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911).

Thus, in *Lister vs. Donlan, supra*, the Court held a note is negotiable which "bears interest at six per cent per annum, payable annually, and contains this clause: 'Interest or principal not paid when due to draw interest thereafter at ten per cent per annum until paid.' "

Similarly, in *Continental Bank vs. Jefferson, supra,* there was a provision for interest on interest at a higher rate. A note dated March 1, 1923, and providing as follows, was held negotiable:

> "March 1, 1924, after date, without grace, I promise to pay to the order of....$7,500.00....with interest at the rate of 8 per cent per annum, payable semi-annually, from date until due.
>
> "Should any of the principal or interest not be paid when due, it shall bear interest at the rate of 10 per cent per annum, payable semi-annually, until paid. * * *"

In upholding the negotiability of the note, the Supreme Court of South Dakota said:

> "In a note in this form, if the maker complies with his contract, there is no question about the amount necessary to pay the note at maturity, and if he does not so comply the matter is one of simple computation."

In *Barker vs. Sartori, supra,* the note provided for interest on interest and, in upholding its negotiability under the Negotiable Instruments Act, the Supreme Court of Washington said:

> "It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing signed by the maker, and contain an unconditional promise to pay a sum certain in money."

A prior decision by the Circuit Court of Appeals of the Third Circuit has held that interest payable semi-annually with a higher interest rate on unpaid interest does not render a note non-negotiable:

DeHass vs. Roberts, 70 Fed. 227, 229 (C. C. A. 3rd, 1895).

The Court there said:

> "The note and coupons are mercantile instruments, not only according to the law of Kansas, by which the parties bound themselves, but according to

> the law merchant as well; and we deem it unnecessary to add anything to what the court has so well said on the subject."

It is true that in that case there was involved a note with coupons attached, but, as it has been pointed out above, this fact is irrelevant where the issue is simply whether the instrument is a negotiable one.

One case which might, at the first blush, seem to oppose the cases upholding the negotiability of these notes is

First National Bank vs. Bosler, 297 Pa. 353, 147 Atl. 74 (1929), infra pp. 25-29.

The basis of that decision, however, was not an objection to interest on interest at a higher rate, but rather an objection to the language used in the particular instrument there involved because, as stated by the Court,

> "The present note has, therefore, two irreconcilable clauses, so far as concerns the interest payable after maturity; one specified in the clause that the debt is to bear eight per cent *until fully paid*, whether before or after maturity, and the other which states that the debt is to bear interest at ten per cent per annum after maturity."

Counsel has found no case which has held that negotiability is impaired by a provision for interest on unpaid interest at a higher rate. There is a *dictum* in the case of

Sharpe vs. Shoenberger, 44 S. D. 402, 184 N. W. 209 (1921),

where the Court stated that the note in suit would be non-negotiable if it were more than a six month note, because in that event the provision for interest upon interest at a higher rate before maturity could become operative. This *dictum*, however, was urged upon that same Court in a later case,

Continental Bank v. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927),

and in the following language was repudiated:

> "In this view we are unable to agree with appellant. It is true that there is a statement in Sharpe v. Shoenberger, 44 S. D. 402, 184 N. W. 209, which would sustain this view. However, in the Shoenberger case the term of the note was 6 months only, and any statement as to the negotiability of the note, if it had been payable more than 6 months after its date, was dictum only, and that dictum we now disapprove."

The rule is stated as follows in

1 Daniel on Negotiable Instruments (7th ed. 1933) 66, 67:

> "But negotiability is not impaired if it provides that if the note is paid on or before maturity it shall not carry interest or shall bear interest at a lower rate, or if not paid when due it shall bear an increased rate of interest, or that *unpaid interest shall bear interest.*" (Italics supplied.)

It is thus seen that all the authorities are in accord in holding that instruments are negotiable notwithstanding provisions for periodical payments of interest before maturity, and for interest on unpaid interest at a higher rate.

3. On principle the instruments should be recognized as negotiable.

Dogma in the law on bills and notes is that an instrument to be negotiable must provide for a sum certain. The only difficulty in the formula is the meaning of a "sum certain". In other fields of the law it is said what a jury can render certain is certain. Manifestly, such is not the meaning of certainty as applied to negotiable instruments. Its actual meaning can only be gathered from a study of the cases. The following are examples of promises held to lack a sum certain:—

1. A certain sum "and all fines according to rule", *Ayrey vs. Fearnsides,* 4 M. & W. 168 (1838);

2. A certain sum and also "all other sums which may be due", *Smith vs. Nightingale,* 2 Stark. 375 (1818);

3. A sum certain "with exchange", *Lowe vs. Bliss,* 24 Ill. 168 (1860). CONTRA: *Smith v. Kendall,* 9 Mich. 241 (1861); *Negotiable Instruments Act §2 (4).*

4. A sum certain together with all costs of collection including attorney's fees, *Jones vs. Rodatz,* 27 Minn. 240 (1880). CONTRA: *Farmers National Bank vs. Sutton Mfg. Co.,* 52 Fed. 191 (C. C. A. 6th, 1892); *Negotiable Instruments Act §2 (5).*

An examination of these cases inevitably leads to the conclusion that certainty of sum as used in regard to negotiable instruments means *commercial* and not *mathematical* certainty. This conclusion was stated in

Cudahy Packing Co. vs. State Nat. Bank, 134 Fed. 538, 542 (C. C. A. 8th, 1904)

as follows:

"The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law.

> It requires commercial, not mathematical certainty. An uncertainty which does not impair the functions of negotiable instruments in the judgment of business men ought not be regarded by the Courts."

With this background it is easier to approach the various contentions raised as to the negotiability of the instruments.

(a) Interest in installments before maturity.

Upon analysis, an instrument with interest payable in installments is no different from an instrument with principal payable in installments. In either case, the instrument may or may not show whether an installment has been paid. That, however, is not the kind of uncertainty which prevented negotiability under the law merchant. The courts in England as well as in the United States have time and again ruled in favor of the negotiability of instruments in which principal was payable in installments:

Oridge vs. Scherborne, 11 M. & W. 374 (Eng. 1843);

Carlon vs. Keneally, 12 M. & W. 139 (Eng. 1843);

Gillette vs. Hodge, 170 Fed. 313 (C. C. A. 8th, 1909).

The Negotiable Instruments Act itself codifies the law merchant on this point, and expressly provides that a sum is certain even though payable in installments. It also clearly recognizes that interest in installments before maturity does not impair negotiability. The following provision is in the

Negotiable Instruments Act, (Florida Laws 1897 C 4524; Comp. Gen. Laws 1927, secs. 6760-6929):

> "*Sec. 2. Certainty as to Sum: What Constitutes.* The sum payable is a sum certain within the meaning of this Act, although it is to be paid:
>
> (1) With interest; or
>
> (2) By stated installments; or
>
> (3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; * * *"

Subdivision (3) obviously recognizes the payment of interest in installments because that is the only way that there could be a default in the payment of interest before the whole becomes due. Likewise subdivision (2), in providing for payment in installments, refers to interest as well as principal. It was so held in

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911),

where the court said:

> "The fact that the interest was payable in installments does not render the notes uncertain, for the statute expressly provides that payment may be made by installments. This applies as well to interest as to principal."

No valid reason exists for a distinction between interest and principal on this score and, therefore, it is submitted that a provision for the payment of interest in installments prior to maturity of principal does not on principle impair negotiability.

(b) Interest on interest at a higher rate.

There are two supposed objections to this provision: (1) Interest on interest causes uncertainty; and (2) Interest at a higher rate raises an ambiguity. These objections will be considered in order.

(i) Interest on interest.

Just as the right to charge interest finally found a place in the common law, so the right to charge compound interest came to be recognized. An excellent historical study in which the Court came to the conclusion that compound interest in a bond is not usurious is seen in

Pawling's Ex'rs vs. Pawling's Adm'rs, 4 Yeats 219 (Pa. 1805).

The rationale of the decision is the common sense remark of Lord Thurlow in *1 Ves. jr. 99, 133* that

> "I am in favor of interest upon interest, because I do not see any reason, why, if a man does not pay interest when he ought, he should not pay interest upon that also".

The real difficulty encountered by courts was the right to interest on interest when there was no bargain for it. In the early case of

Wheaton vs. Pike, 9 R. I. 132 (1868),

interest on interest, due before maturity of principle, was allowed even though not expressly provided for.

In the case at bar, however, such a problem does not arise since the notes expressly provide for interest on interest. Compound interest is not only commercially certain but also mathematically certain. No objection to negotiability, therefore, can be raised on that score. A concise statement of this conclusion is seen in

Brown vs. Vossen, 112 Mo. App. 676, 87 S. W. 577 (1905),

where an instrument was held negotiable in the following language:

> "The note here is for a certain sum with compound interest. There is nothing indefinite, contingent or uncertain in its terms. It provides that if interest was not paid when due, such interest should, thence on, it-

self draw interest. There can be no valid objection to such provisions in the law merchant."

It must be concluded, therefore, that interest on interest is simply a common sense practice which creates neither commercial nor mathematical uncertainty. The provision for a higher rate after maturity is just as certain and, by giving an incentive for prompt payment, aids negotiability.

(ii) Interest at a higher rate in reference to ambiguity.

a) Ambiguity does not prevent negotiability.

If it is assumed that there is an ambiguity because the instrument does not indicate whether the higher rate of interest is to begin to run from the time there was default in interest, or from the maturity of principal, the negotiability of the note is not impaired.

Chitty on Bills and Notes, *150,

has made this statement as to ambiguity:

> "Where there is a *contradiction, ambiguity,* or *uncertainty* in the terms of the instrument, it may, especially against the party making or negotiating it, be so construed as to give effect to it according to the presumed intention of the parties".

A reason for the rule is seen in the following statement by this Court in

Cox vs. National Bank, 100 U. S. 704, 715 (1879):

> "Bills of exchange, like other written instruments, are subject to legal construction in order to ascertain the intent and meaning of the parties, unless the language employed to express such intent and meaning is clear and unambiguous."

The obviousness of this statement is seen by an examination of the Negotiable Instruments Act itself, which

expressly provides in Section 17 for various rules of construction where an instrument is ambiguous. Thus, in the case of

Acme Coal Co. vs. Northrup Nat. Bank, 23 Wyo. 66, 146 Pac. 593 (1915),

there was a conflict as to the rate of interest between handwritten and typewritten provisions. The Negotiable Instruments Act provided for the contingency only of a conflict between writing and printing. The Court had no difficulty whatsoever in holding that the instrument was negotiable and that the writing controlled. Similarly, in the case at bar, assuming there was ambiguous language, the Court can determine exactly what the instrument is supposed to mean, in which case there can be no doubt as to its negotiability.

One case has held that an ambiguity as to interest rate caused the instrument to be non-negotiable:

First Nat. Bank vs. Bosler, 297 Pa. 353, 147 Atl. 74 (1929),

However, the ambiguity in that case arose by virtue of different provisions in the rate of interest on *principal before* and *after* maturity, but not as to interest on unpaid interest, as in the case at bar. It should be noted that in that case the provision was that "deferred payments [and not "deferred *interest* payments," as in the case at bar] are to bear interest from maturity at ten per cent per annum semi-annually." This is clear from the following quotation from that case.

> "The present note has, therefore, two irreconcilable clauses, so far as concerns the interest payable after maturity; one specified in the clause that the debt is to bear eight per cent *until fully paid*, whether before or after maturity, and the other which states that the debt is to bear interest at ten per cent per annum after maturity" (Italics by the Court).

In accord with that case is a lower Court decision in New Jersey,

New Miami Shores Corp. vs. Dugan, 155 Atl. 262, affirmed on an entirely different ground in 160 Atl. 619.

A case involving the identical type of notes in the *Bosler* case, but reaching a directly opposite conclusion, is

Lessen vs. Lindsey, 238 App. Div. 262, 264 N. Y. Supp. 391 (1933).

Not only is the *Bosler case* not pertinent to the issue in the case at bar, but for the reasons and authority given earlier, the *Bosler case* seems wrongly decided. This is the opinion of Dean Goodrich in an article,

Certainty in Negotiable Paper (1929), 2 Pa. Bar Ass'n Quart. 10, 13,

in which he criticizes the case in the following language:

> "The actual basis of decision is thus a very narrow one, that the inconsistency in the language destroyed negotiability by rendering the amount uncertain. Is that exactly the difficulty? Is the uncertainty in this case in the amount which the maker has promised to pay, or is it in determining from the language used just what he is promising? If the first, the instrument may be a good contract but is no promissory note. This is shown by such decisions as the Massachusetts citation in the opinion, a promise to pay 'with interest the same as savings banks pay,' *Whitwell v. Winslow*, 134 Mass. 343, and in *Ayrey v. Feamsides*, 4 M. & W. 168, where the promise was to pay a given amount 'and all fines according to rule.'
>
> "But in the instant case, once the interpretation is straightened out, the promise is definite enough. If the provision for higher interest on deferred payments prevails, the instrument falls within the line of cases cited above. If it is to be thrown out because it is contradictory to the 'until paid' clause, then the promise is obviously definite enough. Ambiguities do not necessarily invalidate negotiability: Section 17 of the

Negotiable Instruments Law provides rules of construction for dealing with some of them. The question here seems the same as that in any other contract where the parties have not clearly expressed themselves. Williston on Contracts, Sec. 624, states: 'If, however, the first clause is general in terms, and the latter is particular, or the latter clause is repugnant only to part of the earlier, it seems that the latter clause would be given full effect, and the earlier subjected to such qualifications as the latter might make necessary.' Applied to this instrument, such a rule would require one rate of interest prior to default, the higher rate thereafter. Or, if the rule of construction were adopted that disregards a rejection of later language inconsistent with that earlier expressed, as shown in *Straus v. Wanamaker,* 175 Pa. 213, 226, the provision for the higher rate would be rejected. Under either alternative, the promise, as interpreted, would be definite."

In a later decision of the Supreme Court of Pennsylvania,

International Fin. Corp. vs. Phila. Whse. Drug Co., 312 Pa. 280, 284 (1933),

Kephart, J., in speaking for the Court, says:

"The paper travels as 'a courier without luggage' until this presumptive freedom of transferability is clearly and definitely restrained by its own evident limitations; *mere words of ambiguity will not restrain its course.*" (Italics supplied.)

A thought to be kept in mind is that it has been held time and again that if two constructions of an instrument are possible, the court should adopt the one in favor of negotiability:

Williamson vs. Craig, 204 Iowa 555, 215 N. W. 664 (1927).

If an instrument is so ambiguous that no single meaning possibly can be ascribed to it, then it should be inopera-

tive and no question of non-negotiability would arise because the court should not strike a bargain for the parties. If, however, there is only an apparent ambiguity, which would leave the court or any reasonable person with but one real meaning as to what was intended, notwithstanding conflicting phrases, the court should give effect to the obvious intent of the parties as to both meaning and negotiability.

b) The interest at a higher rate does not cause any ambiguity.

It will be recalled that the exact provisions of the notes in suit provide as to interest on interest as follows:

> "Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually."

"Deferred interest payments" can only mean interest which has become due but remains unpaid. It is this unpaid interest which is to bear interest at a higher rate "from maturity." Respondent has contended that the word "maturity," as used here, creates an ambiguity. The basis of this contention, as stated by the Respondent in the Brief in Opposition to Petition for Writ of Certiorari, is as follows:

> "'Maturity' when applied to commercial paper means the time when the principal sum of a bill or note becomes due and demandable."

The correctness of this as a general statement is conceded, but in this case "maturity" is not being applied to "commercial paper"—it is being applied to "deferred interest payments." "Deferred interest payments" has a specific meaning. "Maturity" is a general term—it can refer to the due date of any contractual obligation or to the due date of anything else. A familiar and common sense rule of construction, the doctrine of *ejusdem generis,* is

applicable here. The general term, "maturity" refers to the specific term preceding it, "deferred interest payments." The meaning, therefore, must be that unpaid interest is to bear a higher rate of interest from the time that the interest becomes due.

The meaning of the notes, as shown above, is not determined by nor dependent on extrinsic circumstances. The meaning is simply determined by an obvious construction of their provisions. The notes, therefore, do provide for a sum certain.

It has been shown that, as a matter of commercial practice, legal authority and principle the interest provisions of the notes in suit do not destroy their negotiability, and, therefore, on that ground, the judgment of the Circuit Court should be reversed.

B.

THE LOWER COURT WAS BOUND TO FOLLOW THE FLORIDA SUPREME COURT'S INTERPRETATION OF THE FLORIDA NEGOTIABLE INSTRUMENTS ACT.

A second ground on which the lower Court should be reversed is that, in determining the negotiability of Florida contracts, it refused to apply a decision of the highest court of Florida which interpreted the Florida Negotiable Instruments Act.

The Circuit Court of Appeals made the following ruling, which controlled its final decision (R. 23):

> "The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

It is submitted that the Court below erred for two reasons. These will be considered separately.

1. The Judiciary Act compels federal courts to follow State statutes and the construction thereof adopted by the highest court of the State.

(a) The decision of the Circuit Court is an unprecedented extension of the doctrine of Swift vs. Tyson.

The Judiciary Act, Section 34, provides as follows:

> "* * * the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

Judge Story, in his far-reaching opinion in

Swift vs. Tyson, 16 Pet. 1, 18 (1842),

stated:

> "In all the various cases which have hitherto come before us for decision, this Court have uniformly supposed that the true interpretation of section 34 limited its application to state laws strictly local, that is to say, *to the positive statutes of the state, and the construction thereof adopted by the local tribunals,* and to rights and title to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character * * *" (Italics supplied).

The holding of *Swift vs. Tyson* has been subjected to rigorous attacks in this Court. An examination of these decisions shows the exact scope of the doctrine of *Swift vs. Tyson.* Thus in

Mercer County vs. Hackett, 68 U. S. 83, 96 (1863),

this Court, in refusing to follow a Pennsylvania decision that bonds were not negotiable, reiterated the doctrine of *Swift vs. Tyson* and said, as to the Pennsylvania decision:

> "If this decision of that learned court was founded on the construction of the constitution or *statute law of the State* or the peculiar law of Pennsylvania as to titles to land, we would have felt bound to follow it." (Italics supplied).

In

Railroad Company vs. National Bank, 102 U. S. 14, 31 (1880)

this Court reaffirmed *Swift vs. Tyson* with this language:

> "The decisions of the New York court, which we are asked to follow in determining the rights of parties under a contract there made, are not *in exposition of any legislative enactment of that State*" (Italics supplied).

Finally, in the case of

Burgess vs. Seligman, 107 U. S. 20, 33 (1882),

this Court, apparently growing tired of continual attacks on the doctrine, went out of its way to state the rule with such precision as to leave no doubt about the matter. Thus, after deciding that a state decision is not binding if rendered after the controversy arose, the Court stated the precise rule as follows:

> "Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property *and action* in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate *and the construction of State constitutions and statutes.* Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is" (Italics supplied).

It must be remembered that *Swift vs. Tyson* dealt with the negotiability of a note under the law merchant. No statute was involved. In deciding that the federal court would determine for itself the negotiability of the note, Judge Story expressly stated, as seen in the quotation above, that the rule would be *otherwise* if a *statute* were involved. That has always been the construction of Section 34 adopted by this Court, as evidenced by the cases discussed above and by the following quotation from a recent opinion of this Court written by Mr. Justice Holmes:

> "* * * no case yet has gone the length of undertaking to correct the construction of State laws by State courts. The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of those laws by the Supreme Court of the State is as much the act of the State, as the enactment of them by the legislature."
>
> **Jones vs. Prairie Oil & Gas Co., 273 U. S. 195, 199 (1926).**

Notwithstanding the clear and unequivocal language of this Court, the Court below held that a State statute, as interpreted by the highest court of the State, need not be followed if the statute was a *declaratory* one.

Several Circuit Courts of Appeals have reached conclusions which are exactly opposite to the decision of the Court below in the instant case.

In the Fourth Circuit Court of Appeals, there is an express holding that the Federal Court was bound by a decision of the Supreme Court of North Carolina construing the Uniform Negotiable Instruments Act adopted in that State:

Savings Bank vs. National Bank of Goldsboro, 3 F. (2d) 970 (C. C. A. 4th, 1925).

Thus, it was there held (at page 973):

> "In such cases, the views and interpretation placed by the state's highest court upon its own statutes, passed within the inhibitions of the federal constitution, *will be accepted and followed, although questions of commercial law and jurisprudence may be involved* or incidentally arise * * *" (Italics supplied).

The position of that Court was recently re-affirmed in the case of

Niagara Fire Ins. Co. vs. Raleigh Hardware Co., 62 F. (2d) 705 (C. C. A. 4th, 1933),

where the Court said (at page 708):

> "The duty of the federal courts to follow state decisions in the interpretation of state statutes is too well settled to admit of serious discussion. The rule has been followed, not only with respect to statutes dealing with local matters, but also with respect to those affecting general commercial law, such as the Negotiable Instruments Law, which was dealt with in the case of Savings Bank of Richmond v. National Bank of Goldsboro, *supra*."

It is interesting to note that this Court denied a petition for certiorari to the Circuit Court of Appeals for the Fourth Circuit, in which petition this issue was raised:

Bank of United States vs. Cuthbertson, U. S. Sup. Ct., Oct. T. 1933 No. 691, affirming 67 F. (2d) 182 (C. C. A. 4th, 1933).

But, as above indicated, the Fourth Circuit is in accord with the view now presented. Therefore, if any significance is to be given to that denial of certiorari, it must be considered as an approval of the rule of the Fourth Circuit.

In the Circuit Court of Appeals for the Seventh Circuit in

Phipps vs. Harding, 70 Fed. 468 (C. C. A. 7th, 1895),

the issue arose as to the effect which must be given in Wisconsin to an anomalous indorsement on a note delivered in Massachusetts. The Court, in treating the law of Massachusetts as governing the transaction, held with regard to the construction of a statutory provision governing anomalous indorsement (at p. 472):

> "The statute was thus construed by the supreme judicial court of that commonwealth in Bank vs. Law, 127 Mass. 72, prior to the execution of the contract in question. We are, of course, bound by that construction."

In the Circuit Court of Appeals for the Eighth Circuit in

Kobey vs. Hoffman, 229 Fed. 486 (C. C. A. 8th, 1916),

suit was brought in Kansas and the question involved was the negotiability of a note executed and made payable in Missouri. The Court said (at p. 488):

> "The Missouri Negotiable Instruments Law has never been construed by the Court of last resort of that state. We must therefore determine for ourselves

how this statute should be construed. As the Negotiable Instruments Law, on that point, is practically a reaffirmance of the law merchant, the decisions of the Supreme Court of the United States control this court *until the highest court of the state—in this case that of Missouri—construes it,* and then it will only be authoritative on the courts of the United States as to notes and bills executed thereafter" (Italics supplied).

It should be noted that in the case at bar the Court below, in reaching a conclusion contrary to all the authorities set out above, relied on authority as follows:

"Mutual Life Ins. Co. v. Lane, 151 Fed. 276, affirmed 157 Fed. 1002, certiorari denied 208 U. S. 617. Capital City State Bank v. Swift, 290 Fed. 505. Peterson v. Metropolitan Life Ins. Co., 19 F. (2d) 74, affirmed 19 F. (2d) 88. Jackmus v. Clausen, 47 F. (2d) 766."

But it must be noted that among these purported authorities, there is no direct appellate decision which supports the position of the Court below. Thus, in the case of

Mutual Life Ins. Co. vs. Lane, 151 Fed. 276, affirmed under the name of Alexander vs. Lane, 157 Fed. 1002 (C. C. A. 5th, 1907) and certiorari denied, 208 U. S. 617 (1908),

cited as authority by the court below, a *per curiam* opinion of one sentence by the Circuit Court of Appeals for the Fifth Circuit affirmed the lower court on the basis of two other cases that have nothing whatsoever to do with the problem in the instant case. This *per curiam* opinion did not even mention the problem here involved. It is also significant that in the petition for certiorari in that case, which was denied by this Court, the question herein stressed was not even raised.

In the case of

Peterson vs. Metropolitan Life Ins. Co., 19 F. (2d) 74, affirmed 19 F. (2d) 88 (C. C. A. 8th, 1927),

also cited by the Court below as authority, it was expressly conceded in the Circuit Court (at page 90) that the note was *non-negotiable* under the Uniform Negotiable Instruments Law of Iowa, and, therefore, there was no discussion of the issue involved in the case at bar. On the contrary the position of the Eighth Circuit on this question is clearly set forth in *Kobey vs. Hoffman, supra,* and is just diametrically opposite.

The other two references made by the Circuit Court are to *dicta* in District Court decisions, wherein it was unnecessary to determine the issue here involved.

In still other decisions, the Federal Courts have expressly refused to decide the question:

Forrest vs. Safety Banking & Trust Co., 174 Fed. 345, 348 (E. D. Pa. 1909);

> "How far a federal court would be bound by the decision of a state court that construed a statute occupying the peculiar position of the Negotiable Instruments Act—that is to say, attempting to codify and make uniform the rules that govern an important topic of general commercial law—presents an interesting question, upon which no opinion need now be expressed."

or have equivocally answered the problem as in

Smith vs. Nelson Land & Cattle Co., 212 Fed. 56, 62 (C. C. A. 8th, 1914):

> "We place our decision upon the statutes of Kansas as construed by the Supreme Court of that state, and as we construe them."

This survey of the foregoing cases reveals the complete lack of appellate court authority in accord with the lower court. There are, however, various cases which upon

a cursory glance might appear to support the position of the lower court. One of the most confusing cases on this score is probably

Watson v. Tarpley, 59 U. S. 517 (1856).

In that case, suit was brought by a resident of Tennessee in a federal court in Mississippi against a drawer of a bill of exchange which was drawn against a party in Louisiana. Upon refusal by the drawee to accept, and due notice of protest, suit was started. The lower court charged that the plaintiff would have to prove non-payment. It was suggested to this Court that the basis of the lower court's charge was a Mississippi statute prohibiting suit on a bill of exchange until its maturity. This Court held that the charge was improper because the Mississippi *statute* could not bar rights of a person not domiciled in that jurisdiction, and said:

> "The statute of Mississippi, so far as it may be understood to deny, or in any degree to impair the right of a non-resident holder of a bill of exchange, immediately after presentment to, and refusal to accept by the drawee, and after protest and notice, to resort forthwith to the courts of the United States by suit upon such bill, must be regarded as wholly without authority and inoperative."

The Court there was not concerned with the effect that must be given to a state decision but rather the effect to be given a state statute. No one doubts that a State by statute can change the general commercial law existing therein but an entirely different issue is raised where, as in the case just mentioned, there is an attempt to give an extra-territorial effect to the statute by denying access to domestic courts in a given situation.

There must also be distinguished from the case at bar various lines of cases which are apt to be a cause of confusion. First there is the line of cases where no state

statute enters the picture. Decisions under such circumstances are merely expository of *Swift vs. Tyson*, as pointed out in the cases mentioned above. To that list of cases can be added,

Goodman vs. Simonds, 61 U. S. 343 (1858).

Closely allied to these cases are cases where there is a state statute but the issue involved is not a construction of the statute by the highest court of the state. *Watson vs. Tarpley, supra*, is an example of such a decision. Other examples are seen in

Oates vs. National Bank, 100 U. S. 239 (1879);
Cudahy Packing Co. vs. State Nat. Bank, 134 Fed. 538 (C. C. A. 8th, 1904);

where the statute mentioned is one comparable to the Statute of Anne in providing that notes come under the law merchant, but the issue involved state decisions which were not based on the statute. Since counsel for the Respondent have urged the *Oates* case upon the Court, it is interesting to point out the following language in that case (at p. 242):

> "It seems that upon this precise point there has been no direct adjudication by the Supreme Court of Alabama, *to which primarily belongs the duty of giving authoritative construction of the statutes of that State.*" (Italics supplied.)

Other cases which should not be confused with the instant case are those wherein the state decision was rendered after rights and obligations had accrued. Examples of such decisions are:

Burgess vs. Seligman, 107 U. S. 20 (1882);
Town of Newbern vs. National Bank, 234 Fed. 209 (C. C. A. 6th, 1916).

This analysis of the authorities makes it obvious that the lower Court, contrary to authority, has extended the

doctrine of *Swift vs. Tyson*. A further question is whether this extension is warranted to such a degree that this Court should permit it.

(b) The unprecedented extension of Swift vs. Tyson is unwarranted.

The time honored doctrine of *Swift vs. Tyson* has been criticized on the bases of historical research, modern conception of law in its philosophical sense, the self-centered personality of Judge Story, and statistics which have shown the part played by this decision in the overcrowding of the federal courts. None the less, *Swift vs. Tyson* is still the law. It must be remembered, however, that all the criticism and arguments against *Swift vs. Tyson* apply with even greater force against the extension of that doctrine. It is with this very thought in mind that Mr. Justice Holmes, in one of his dissenting opinions, indicated the attitude of this Court upon the extension of this doctrine by the following concise and pointed statement:

> "I should leave *Swift vs. Tyson* undisturbed, as I indicated in *Kuhn vs. Fairmount Coal Co.*, but I would not allow it to spread the assumed dominion into new fields."
>
> **Black & White Taxicab vs. Brown & Yellow Taxicab, 276 U. S. 518, 535 (1928).**

The very cause of the rule of *Swift vs. Tyson* in so far as questions of general commercial law is concerned, does not apply where any kind of state statute is involved. The reason for that decision was the then existing conception of the common law as a perfect system of law under which one and only one correct answer to any legal problem was possible. In light of this conception, it was

but natural that a court of wider jurisdiction, more significance and greater powers, would make its own determination of what the common law was rather than follow the opinion of another court. However, this cause for the rule does not apply once a statute is involved because "the law" is that statute, and not the general principles of a "system of law".

Thus, although *Swift vs. Tyson* involved negotiable instruments, it was decided at a time when no state had any comprehensive statute governing negotiable instruments. But at present every state, including Florida, has seen fit to supplant general principles of commercial law by the adoption of a positive statute—the Negotiable Instruments Act. Though the Negotiable Instruments Act is to a great degree a codification of general commercial law principles, the various legislatures deliberately adopted this comprehensive statute to be the basis for deciding all questions of negotiable instruments. As a statute, it necessarily becomes the first and authoritative point of inquiry for determination of any problem the facts of which come within its scope. The statute has become the law of the state adopting it, regardless of the *precedent* the legislature followed in formulating it.

The Negotiable Instruments Act was created by legislative process, the same as any other statute. The mere fact that it is comprehensive and to a large extent an adoption of prior commercial law principles, does not take away its character as a "positive statute" designed to be the sole authority for future court decisions in the particular State. And whatever "construction" is placed on that statute by the highest tribunal of that State must be followed by the federal courts.

But under the Circuit Court's decision in the instant case different consequences will result depending upon the precedent followed by the legislature in formulating the statute. It may be suggested at this point that the decision of the Circuit Court raises a number of queries which themselves reveal the error in the decision: By whom, and by what test, is it to be determined whether a statute is merely declaratory of general law? Will this be determined by the federal court or by the state court? Will it depend on whether the statute itself says it is declaratory, or will it depend upon whether the particular provision looks like the rule which existed prior to the statute?

The Circuit Court of Appeals made no analysis of this problem, and it is submitted that as a result its very decision reveals what appears to be a *non sequitur*, if not an actual inconsistency. The Court held that (1) state decisions construing the Negotiable Instruments Act need not be followed by the federal courts because the statute was declaratory of the law merchant; and (2) under the law merchant the notes were not negotiable. The Court failed to take into consideration any of the decisions upon the question of the negotiability of these notes rendered under the Negotiable Instruments Act. These decisions, as pointed out *supra*, at page 12 *et seq.*, have held that the notes *are* negotiable. It follows, therefore, that if, as the Court below ruled, under the law merchant these notes were *not* negotiable, then the Negotiable Instruments Act is *not* declaratory of the law merchant. Conversely, if the Negotiable Instruments Act is declaratory of the law merchant, and under it the notes are held negotiable, it must follow that the notes *were* also negotiable under the law merchant. We submit, therefore, that since the reasoning of the Court

below is fallacious under either of the two possible alternatives, its conclusion is erroneous.

The public significance of the decision of the Circuit Court cannot be over-emphasized. In recent years, there have been great advances in the codification of the common law. Uniform laws have been adopted on diverse subject matters in all the states. One of the earliest and probably the most important of these laws is the Uniform Negotiable Instruments Act. If this decision of the Circuit Court is not reversed, its effect will be tremendous. In cases involving questions of bills and notes, sales, bills of lading, partnerships, stock transfers, and all the other subjects which have purportedly been unified, we will soon find the assertion of different law within the very same jurisdictional boundaries depending on whether a federal or a state court renders the decision. Such a condition would be especially deplorable in the field of bills and notes, the utility of which is based upon freedom in circulation, which in turn depends upon known legal rights that go with them.

It is for these reasons that a conclusion exactly opposite to that of the Circuit Court of Appeals is reached in two Law Review articles directly in point:

Fordham, the Federal Courts and the Construction of Uniform State Laws (1928) 7 N. Car. L. Rev. 423.

"Our conclusion is that the doctrine of Swift and Tyson should not be applied in the construction of uniform state laws. It is required neither by consideration of authority nor by policy."

Dobie, Seven Implications of Swift vs. Tyson (1930) 16 Va. L. Rev. 225.

"It is believed, therefore, that as a solution of the immediate problem the rule of compulsory con-

formity on the part of federal courts to the state construction of uniform state laws should be followed."

The instant case shows still another feature which makes the problem even more acute. The notes in suit were executed and delivered in Florida. They were also payable in Florida. Authorities all agree that under the rules of Conflict of Laws the law of Florida governs upon the question of the negotiability of these notes.

Restatement of Conflict of Laws, Proposed Final Draft No. 2, Sec. 360 (Am. L. Inst. 1931) states:

"The law of the place of contracting determines whether a mercantile instrument is negotiable."

If suit on a note is brought in a state court in any state of the Union, the rights of the parties are uniform because Florida law governs. But if suit is brought in a federal court in the same territorial boundary, opposite rights may prevail. This would place a litigant, whose claim is large enough to warrant federal jurisdiction and where there is a diversity of citizenship, in a position to change his substantive rights by choice of the forum, even though the law of the particular State, whose decisions ordinarily would govern the instrument in question, had been positively fixed by both statute and court interpretation. If suit were brought on a note in a state court of another state, the decision, following the law of the state where the instrument was made, might be one way, and if suit were brought or removed to a federal court sitting in the same state, the decision would be entirely different. No one would know what the rights of the respective parties are until litigation was completed. The Circuit Court has recognized the importance and necessity of certainty in so far as *the sum* is

concerned. But it appears that in its over-zealousness on that score the Court has overlooked the great importance of the certainty of *the law* which is to govern the rights of the parties.

For the reason, therefore, that this decision of the Circuit Court is an unprecedented and unwarranted extension of *Swift vs. Tyson* which is fraught with far reaching consequences preventing uniformity and certainty of law it is submitted that this Court should reverse it.

2. The Full Faith and Credit clause of the Constitution compels a federal court, in determining contractual rights created in a State, to apply State statutes and the construction thereof by the highest court of the State.

In 1912, the Supreme Court of Florida decided that under the Florida Negotiable Instruments Act, adopted in 1897 (Fla. Laws 1897 C 4524; Comp. Gen. L. 1927 §§ 6760-6929), certain interest provisions in a promissory note would not render it non-negotiable:

Taylor vs. American National Bank, 63 Fla. 631, 57 So. 678 (1912).

In 1925, the notes in suit, containing interest provisions similar to those in the case decided by the Supreme Court of Florida, were made, executed and delivered in Florida. They were also payable in Florida. Prior to maturity, without notice of any defects and for valuable consideration, they were negotiated. Then they were acquired by the plaintiff, a Florida corporation, for a valuable consideration. Upon suit on these notes, the District Court for the Eastern District of Pennsylvania and the Circuit Court for the Third Circuit refused to apply the aforesaid decision of the Supreme Court of Florida which had held these interest provisions would not render the notes non-negotiable. Under their own interpretation of the law merchant the federal courts below held the notes were *not* negotiable. Its refusal to apply the Florida decision, the Circuit Court said, was because the Florida Negotiable Instruments Act was a declaratory statute and not a statute which changed the law merchant (R. 23).

The opening section of

Article 4 of the United States Constitution

provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

The question here is whether the Circuit Court has given "Full Faith and Credit" to the "public Acts, ... and judicial Proceedings" of the State of Florida.

It is, of course, no longer open to question that a federal court, like a State Court, must comply with the "full faith and credit" clause:

Bradford Electric Co. vs. Clapper, 286 U. S. 145 (1932).

This same case has reiterated the principle long ago adopted that full faith and credit must be given to State statutes. Since full faith and credit had to be given to statutes, it was but natural to hold that full faith and credit must be given to decisions interpreting those statutes:

Royal Arcanum vs. Green, 237 U. S. 531 (1915);
Converse vs. Hamilton, 224 U. S. 243 (1912).

A reason for this conclusion is seen in this statement by Mr. Justice Holmes in

Jones vs. Prairie Oil & Gas Co., 273 U. S. 195, 200 (1926):

"The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of these laws by the Supreme Court of the State is as much the act of the State as the enactment of them by the legislature."

Then also there is this very forceful statement by Mr. Justice Field in the case of

Louisiana vs. Pilsbury, 105 U. S. 278, 294 (1881):

"The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred

under it are concerned, constitutes a part of the law as much as if embodied in it. *So far does this doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it.*" (Italics supplied.)

The notes in suit became binding obligations in accordance with the laws of Florida. The Circuit Court did not deny this. It held, however, that because the Florida Negotiable Instruments Act was *declaratory* of the law merchant, a federal court did not have to give the same effect to its construction as if it were a statute that *changed* the law merchant. Upon what does the Circuit Court base its distinction as to the effect that must be given to state statutes? In Florida the same effect is given to its statutes irrespective of the historical development or precedent behind the statute, and irrespective of whether the statute codified or changed its common law. It is submitted, therefore, that when the Circuit Court gave less effect to the Florida Negotiable Instruments Act because of a distinction which is not recognized in Florida the Circuit Court failed to give "*full faith and credit*" to a "*public act*" of the State of Florida.

The Circuit Court failed to give full faith and credit not only to a "public act", but also to "a *judicial proceeding*" of the State of Florida. The Florida Supreme Court had held similar notes negotiable under the Florida Negotiable Instruments Act. The Circuit Court expressly refused to follow the decision. This was in violation of the full faith and credit clause as stated by this Court in

American Surety Co. vs. Baldwin, 287 U. S. 156, 166 (1932):

"The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts."

The basis of petitioner's contention is not that the Circuit Court has erroneously *construed* the Florida Negotiable Instruments Act or decisions thereunder. If that were so, it is recognized that, as stated by Mr. Justice Brandeis by way of footnote in the recent opinion in:

Ohio vs. Chattanooga Boiler, 289 U. S. 439, 443 (1933):

"Had the question been merely the construction of the statute, no issue under the full faith and credit clause would have arisen."

Thus, in one of the cases cited for that proposition:

Banholzer vs. New York Life Ins. Co., 178 U. S. 402, 406 (1900),

this Court said:

"The ruling was a construction of the statute, *not a denial of its validity*, and that the court meant no more, and meant to follow, *not oppose*, the decisions of the State, is evident from its opinions." (Italics supplied.)

And, in another case, also cited by Mr. Justice Brandeis:

Pennsylvania Fire Ins. Co. vs. Gold Issue Min. & Mill Co., 243 U. S. 93 (1917),

this Court said:

"There is nothing to suggest that it was not candidly construing the Colorado statutes to the best of its ability, and, even if it was wrong, something more than an error of construction is necessary in order to entitle a party to come here under Article 4, §1".

It will be noted that in the case at bar, as pointed out above, the issue is not whether the Circuit Court has *misinterpreted* the Florida Negotiable Instruments Act, nor is

it whether the Circuit Court has *misinterpreted* the Florida decisions construing the Florida Negotiable Instruments Act. The issue here is whether the Circuit Court erred in *refusing to follow* a decision which it expressly *recognized* settled the law in so far as Florida or a Florida Court was concerned.

Furthermore, Petitioner wishes to point out that under this argument it is not resorting to the "full faith and credit" clause in order to have this Court become a final arbiter of questions of *conflict of laws* even though it has been suggested that such a result is being approached by decisions of this Court:

> **Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws (1926), 39 Harv. Law Rev. 533.**

In the instant case that position need not be taken. It is not contended that the Circuit Court has violated any principle of conflict of laws. The Circuit Court did not deny that Florida Law governs the substantive rights resulting from the negotiability of a note. The error of the Circuit Court, it is submitted, was committed when it decided that it could determine the question of negotiability for itself, and that it need not follow a Florida Supreme Court decision that interpreted the Florida Negotiable Instruments Act, giving as its reason a supposed distinction between declaratory and non-declaratory statutes, which distinction, as pointed out above, is not recognized in Florida.

Refusal by a federal court to give full faith and credit to a state decision interpreting a state statute because the statute is declaratory of the common law is not only a denial of a constitutional right, guaranteed by Article 4, § 1, but will have the effect of destroying the very purpose of these uniform statutes, which is to create uniformity in the law throughout the country. It is, therefore, urged that this is another reason why this Court should reverse the decision of the Circuit Court.

CONCLUSION.

The decision of the lower Court has rendered uncertain the negotiability of instruments which are in commercial use throughout the nation. Commerce has found these instruments especially expedient in two types of obligations—evidences of indebtedness secured by a mortgage and corporate debentures. The particular advantage of these instruments lies in their interest provisions. These give the obligations real worth as an investment by means of provisions for a periodical payment of interest before maturity of principal and by interest on interest at a higher rate if not paid when due.

It has been shown that the use of these instruments by the commercial world has been approved by the courts, and that the interest provisions create no obstacle to the commercial certainty which the law requires for negotiability. Cases before and after the Negotiable Instruments Act approve in law the adoption by the business world of instruments with such interest provisions.

Furthermore, interest provisions in the case at bar are fair, reasonable, and certain. Hypercriticism of the language used in the instruments has been resorted to in

order to set up a purported ambiguity. There is no ambiguity in these instruments, but even if that ambiguity did exist, it would not invalidate the negotiability of the instruments.

The necessity for certainty in sum as to negotiable instruments is more than matched by the necessity for certainty of the law governing such instruments. The purpose of the Negotiable Instruments Act and the rising tide of codifications in other fields of commercial law is to create such a certainty in business transactions. A decision of the highest court of a State interpreting such legislation and lending to it a final degree of certainty was within the contemplation of the legislature in passing the legislation. A similar view was within the contemplation of the federal legislature in enacting Section 34 of the Judiciary Act which compels federal courts to follow State law. Under the decision of the lower Court in the instant case, a final degree of certainty under any of these declaratory statutes is almost impossible. The law in a State court would be certain as soon as a decision of the highest court of the State was made, but the law in any federal court would not be certain until this Court spoke. Even then, unless the decision of this Court was in accord with that of the State court, there would be no certainty in the law governing the instrument because it could vary with the choice of jurisdiction. Hence the Circuit Court's decision is an unwarranted extension of the doctrine of *Swift v. Tyson*.

The rights and obligations herein involved were created on the faith of the law as set forth in the decisions of the highest Court of Florida interpreting the Florida Negotiable Instruments Act. Rights were transferred on the basis of that law. The lower Court nevertheless refused to follow that law merely because it was based on a statute which it termed declaratory of the law merchant. This re-

fusal to apply the State law because the statute was declaratory constituted a violation of the Full Faith and Credit clause of the Constitution.

It is submitted, therefore, that the decision of the lower Court should be reversed.

Respectfully submitted,

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